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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1961.

No. 231

UNITED STATES LINES COMPANY,

Petitioner,

against

JULIO DINIERO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOSEPH M. CUNNINGHAM,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

CHARLES N. FIDDLER,
JOSEPH P. RITORTO
and
KIRLIN, CAMPBELL & KEATING,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Petitioner prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 28, 1961. Petitioner's petition for rehearing was denied by the Court of Appeals on April 19, 1961.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Second Circuit (R.* 63a-72a) printed on pages 25 to 33 of the Appendix hereto, *infra*, is reported at 288 F. 2d 595.

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* The parenthetical page references preceded by "R." in this petition are to those pages in the appendix record certified by the clerk of the Court of Appeals for the Second Circuit.

The denial of the petition for rehearing by the Court of Appeals, (R. 86a), which has not as yet been officially reported, is printed at page 34 of the Appendix hereto, *infra*.

Grounds of Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on March 28, 1961. A petition for rehearing was filed by defendant on April 10, 1961 (R. 75a-85a) and was denied on April 19, 1961 (R. 86a).

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U. S. Code. The Court's jurisdiction is also invoked under Rule 19 of the United States Supreme Court.

Questions Presented.

The unfounded speculation by the Court of Appeals that the interrogatories submitted to the jury under Rule 49(b), F. R. C. P., were withdrawn to eliminate confusion caused by an ambiguous question although the record of the proceedings in the district court clearly indicate that the questions were withdrawn solely because the jury could not agree on an answer to the first, and most important, question makes it necessary to divide the "questions presented" by this petition into those created by what ACTUALLY *took place in the trial court and those which are the* INVENTION *of the Court of Appeals.*

1. Does Rule 49(b) of the Federal Rules of Civil Procedure permit a trial judge, solely for the stated purpose of seeing whether the jury can agree on a general verdict, to experiment with the right of a party to a jury trial by withdrawing a written interrogatory (as well as seven other

written interrogatories) on an *issue of fact necessary to a verdict*, after the jury deliberated thereon and specifically finds in writing that there is no chance for agreement on a unanimous answer to that interrogatory?

2. When the issue embodied in a special interrogatory is the plaintiff's sole claim of causation and therefore so necessary that if the jury answered this interrogatory in the negative a general verdict for the defendant would be compelled by Rule 49(b), does the withdrawal of this interrogatory in the face of a jury disagreement thereon deprive the defendant of its right to a fair trial by a jury?

3. Did the instructions by the District Judge that the jury was to "forget all the questions I gave you" and that the jury could "disregard the questions", combined with further entreaties by the court after many hours of deliberation into the evening, have such a coercive tendency on the jury as to deprive the defendant of a fair jury trial on the factual issues contained in these questions?

4. Does the mandatory language of Civil Rule 49(b) that "the court *shall direct* the jury both to make written answers and to render a general verdict" (emphasis added) permit a trial judge to instruct a jury during deliberation on these questions that the jury should "forget all of the questions I gave you and see whether you can't agree on a general verdict"?

5. Does the discretion given a trial judge by the language of Rule 49(b) whether to submit questions of fact to the jury imply a like discretion to withdraw them after the jury has deliberated and expressly found it could not agree, although no such discretion may be found in or inferred from the language of Rule 49(b)?

6. Since the propriety of withdrawing fact questions from a jury after disagreement and during the jury's deliberation has never been decided by any federal court prior to the present case, will the instant opinion of the Court of Appeals, if allowed to stand, result in confusion in the administration of Rule 49(b)?

7. Is the disagreement by a jury on a fact question framed as an interrogatory under Rule 49(b), an answer indicating a failure of the party with the affirmative of the issue contained in that question to sustain a burden of its proof? If so, would it be a deprivation of the defendant's right to trial by jury under the Seventh Amendment of the Constitution of the United States for a trial judge to ignore such an answer, withdraw the question containing said issue and all the other questions before the jury, and instruct the jury to forget its first answer and arrive at a general verdict?

The following questions were "created" by the opinion of the Court of Appeals:

8. Was it error for the Court of Appeals to speculate that the trial judge withdrew written interrogatories from the jury not for the purpose stated by the trial judge of seeing whether the jury could agree on a general verdict, but—basing its finding on something that never happened during the trial and which had not even been mentioned before the appeal—viz: that the eight interrogatories were withdrawn solely because the interrogatory on which the jury found it could not agree was "unclear" and "ambiguous"; notwithstanding the same interrogatory was so clear to the jury that it made no request whatever for further clarification, although the jury was specifically

invited by the trial judge to request such clarification if it "isn't clear"?

9. May a Court of Appeals determine for the first time (without any objection or mention thereof at the trial) that a written interrogatory, which could have been categorically answered by a jury and which is not found to breach the requirement of Rule 49(b) that the interrogatory be upon one of "the issues of fact the decision of which is necessary to a verdict", is, nevertheless, "improper" because "ambiguous"?

10. Which of two Circuit Courts of Appeals, the Second or the Sixth, is correct—the Court of Appeals for the Sixth Circuit holding that a trial judge may not engage in experimentation with a jury after the jury has disagreed, or the Second Circuit in the present opinion which in effect allows a trial judge to experiment with a jury after it has expressed disagreement?

11. Which of two Circuit Courts of Appeals, the Second or the Ninth, is correct—the Court of Appeals for the Ninth Circuit holding that a trial judge has only two permissible alternatives when confronted with a jury disagreement on an interrogatory, viz: to send the jury back for further deliberation or to declare a mistrial; or the Court of Appeals for the Second Circuit in the present opinion which has created a third alternative, by allowing a trial judge discretion to withdraw an interrogatory upon a jury's express disagreement?

Statutes Involved.

The statutory provisions involved in this suit are:

Rule 49(b) of the Federal Rules of Civil Procedure, sub-entitled "General Verdict Accompanied by Answer to Interrogatories", which provides as follows:

> "The court *may* submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court *shall* give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court *shall* direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court *shall* direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court *may* direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or *may* return the jury for further consideration of its answers and verdict or *may* order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court *shall not* direct the entry of judgment but *may* return the jury for further consideration of its answers and verdict or *may* order a new trial." (Emphasis added.)

and;

Amendment 7 of the United States Constitution, which provides as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Statement.

As stated in the opinion of the Court of Appeals (288 F. 2d 595, 596) the plaintiff claims to have injured his back by repeated strains during the performance of his duties between April 6 and September 30, 1954 on the *SS. Pioneer Land* (which involved opening and closing a valve) as to "cause" a ruptured intervertebral disc. As expressed in the opinion of the court of appeals the plaintiff's claimed injury occurred solely because ". . . the only way he could operate the valve was by removing the deck plate, crouching down and moving the wheel of the valve by the use of a wrench." It is undisputed that the plaintiff made no other claim of causation.

At the conclusion of an eight day trial in the United States District Court for the Southern District of New York, the trial judge submitted eight written questions to the jury pursuant to Civil Rule 49(b).

The first question called for a finding of fact on the basic issue of the only "cause" advanced by the plaintiff. Unless the plaintiff sustained his burden of proof on that issue by persuading a unanimous jury to answer "yes" to this interrogatory, a general verdict for the defendant was required.

Interrogatory numbered one read as follows (R. 11a):

> Question 1. "Did the plaintiff injure himself aboard the *Pioneer Land* because in operating the blowdown valve he had to remove the floor plates, then crouch and exert physical effort with a wrench and not his hand to stop it from leaking? Answer yes or no."

The seven other interrogatories were (R. 11a-12a):

Question 2. "Was the *Pioneer Land* unseaworthy because of the condition of the blow-down valve?"

Question 3. "Was the defendant negligent?"

Question 4. "If the *Pioneer Land* was unseaworthy, or if the defendant was negligent, did either or both proximately cause plaintiff's injuries?"

Question 5. "Did plaintiff contribute in any wise to his injuries?"

Question 6. "If plaintiff was contributorily negligent, what percentage of his negligence contributed to his injuries?"

Question 7. "Is your verdict for the plaintiff or for the defendant?"

Question 8. "If your verdict is for the plaintiff, what is the total amount in dollars for plaintiff's damages, without giving any consideration to the question of whether or not he was contributorily negligent?"

It is admitted that the first interrogatory contains a full recital of the only factual claims made by the plaintiff as to the *cause* of his injury. Plaintiff never claimed he was injured by any specific trauma or incident.

No objection was made by either party to the use of these special interrogatories by the trial judge, nor was any objection made to the form or content of any interrogatory.

After the jury deliberated on the above interrogatories about three hours it returned to the court room and asked for the court's interpretation of the word "had" in the first interrogatory. The trial judge answered the jury's inquiry by instructing it as follows (R. 16a-17a):

> "What I was trying to find out by the first question was whether or not plaintiff injured himself

on board this ship, assuming that he had to remove the plates, assuming that he had to crouch down, and assuming he exerted this pressure with the wrench instead of his hand?

"So in answer to your specific question as to the interpretation of the word 'had' it means that I assumed that he had to remove the plates, and he had to do this, and he had to do that. I didn't mean to take away from you the question as to whether he did in fact have to do that. In other words, the purpose of the question is to find out whether the plaintiff injured himself on board the ship in the manner that he described. The defendant claims that he did not. So the first question that I wanted answered was did (27) he injure himself aboard the ship by doing what he said he did?

"If you find that he didn't remove the plates or he didn't bend down, or he didn't crouch, or he didn't have to, or he didn't do it, those questions will be answered as you go on further down by your answers to the other questions.

"But in my first question I assumed as a fact, accepted the plaintiff's testimony, that he had to bend down, that he had to crouch, that he had to remove the plates.

"What I wanted to find out was, assuming all of that, did he injure himself on board the *Pioneer Land*.

"*Now I hope that is clear. If it isn't, you can write me another note.* Ordinarily, I would ask you to ask me the questions right now, but my experience is that once jurors start asking questions orally something develops that will cause a mistrial, and that I don't want to do. So *if it isn't clear, your foreman can write me another note.*" (Emphasis added.)

In a discussion with the attorney for the defendant, shortly after the jury retired, the trial judge, in speaking of the above supplemental instructions, said, ". . . I thought

that I made it clear" (R. 17a) and "I just have a feeling that it is quite clear" (R. 18a).

In fact, the trial judge had specifically invited the jury to make further inquiry if they concluded that the question was not clear after this supplemental instruction. It is evident that the jury found the interrogatory clear following this instruction, for they deliberated on the answer to this interrogatory without making further inquiry concerning its meaning.

About an hour later, the jury sent a second note to the court, the contents of which the trial judge refused to reveal to the attorneys until a verdict was returned almost four hours later.

This second note did not request any further elucidation of the meaning of the first interrogatory. It read (R. 24a):

> "Your Honor, we cannot agree on question one. It appears that there is no chance for an agreement".

This certainly was not a request for clarification from the jury. Consequently the trial judge, who felt the interrogatories were "quite clear", correctly assumed that the jury was unable to agree on the *cause* of the plaintiff's injury.

Without consulting with the attorneys for either party, the trial judge withdrew, not only the first interrogatory but all of the eight interrogatories for the sole purpose of easing the way for the jury to arrive at a verdict.

Neither party had ever objected to any of the eight interrogatories. No reference was made by the trial judge or by either party to an ambiguity in any interrogatory. The trial judge clearly understood that the eight interrogatories were being withdrawn solely because he wished to avoid a "hung" jury and resulting mistrial and not because of any ambiguity in any interrogatory.

In order to accomplish this purpose of easing the way to a verdict the trial judge charged the jury (R. 18a-19a):

> "I have another note from the jury, which I won't read. In substance, it relates to some disagreement.
>
> "What I am going to do, in an effort to see whether you can agree, I am going to ask you to forget all of the questions I gave you and see whether you can't agree on a general verdict. In other words, your foreman will report that you find for the plaintiff (31) or for the defendant, and if you find for the plaintiff, the amount in dollars. I think that might relieve the situation some.
>
> "I hope you can come to some agreement. The case is costly. It has taken eight days of real yeoman work on the part of the lawyers and yourselves. *So disregard the questions. You don't have to answer any of them.* See whether you can't agree on a general verdict—that is, you find for the plaintiff or for the defendant, and the amount, if you find for the plaintiff.
>
> "If you can't agree on a general verdict, tell me.
>
> "Would you retire just again and try?" (Emphasis added.)

This is all that happened when the trial judge told the jury to abandon deliberation on the questions of fact contained in the interrogatories. There was nothing from which any reasonable person could conclude that the interrogatories were withdrawn for any purpose other than the trial judge's stated purpose of obtaining a jury verdict in a time consuming case.

It was sheer speculation and invention for the Court of Appeals to state in its opinion, written months later, that the withdrawal of the eight interrogatories was made "for the purpose of eliminating the confusion caused by the formulation of an improper question" (a question which

the trial judge and both parties regarded as perfectly proper) particularly when the appellation "improper" was used not because the interrogatories did not comply with the standards required by Rule 49(b) but solely because of an ex post facto characterization by the Court of Appeals that the interrogatories were "unclear".

The action of the trial judge in withdrawing the eight interrogatories from the jury was objected to by the attorney for the defendant. No objection was made by the attorney for the plaintiff.

At 9:22 P. M., about two hours and forty minutes after the interrogatories were withdrawn, the jury sent the following note (R. 21a):

> "Your Honor, the jury finds it impossible to arrive at a unanimous agreement in this case.
>
> "Foreman."

The trial judge then instructed the jury in the following language (some of which was extracted from the case of *Allen* v. *United States* [1896] 164 U. S. 492, 501) (R. 21a-22a):

> "Gentlemen, I know that the hour is late and that you have honestly tried to resolve your differences. But I must impress upon you again—and I don't do it by any theory of coercion. At least I am old enough to know that reasonable people can disagree—but this case has been pending a long while and the attorneys have exerted a great deal of effort, time, and money in an attempt to resolve it, and I know that if you can't resolve it, you can't, and that is a fact of life. But I am going to urge you once more to try to resolve it, and then in order to help you I am going to read to you what the Supreme Court said in a case where the jury was in disagreement a hundred years ago, and it is the law today, and I think it is a (35) tremendous philosophy.

"I am sure you are conscious of the fact that lawsuits cost money, and eight days of a lawsuit, just considering your expense, not your sacrifice—just your expense—and I know that you have sacrificed many more dollars than all of us together, perhaps, being divorced from your businesses and from your lives, but you know you get seven dollars a day plus your ten cents a mile.

"Assuming that is only $90 a day, ninety times eight is some money, plus the rent for the place, and everything else, and it runs into money. A lawsuit should be resolved if it possibly can.

"This is what the Supreme Court said a hundred years ago:

> 'While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment (36) if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself.'

"So, gentlemen, I implore you to try again. If you tell me that you can't agree, it is impossible, that is enough for me, and you just tell me; but I wish you would just try again. It is only half-past nine. You have had the case since, actually, a quarter to three. I know it is yeoman service, hard work, but try to agree, gentlemen, and if you can't, I will excuse you.

> "So will you again retire to your room and try to agree, and as I said, if you can't, that is the end of it.
> "All right, gentlemen, thank you."

After hearing this supplemental charge the jury retired and returned in about an hour (10:30 P. M.) with a verdict for the plaintiff for $46,150.

It was at this time that the trial judge first informed counsel of the contents of the second note from the jury which read (R. 24a):

> "Your Honor, we cannot agree on question one. It appears that there is no chance for agreement. Foreman."

In addition to the plaintiff's action under the Jones Act (46 U. S. C. §688) based on negligence, the plaintiff also sued under the general maritime law for maintenance, which cause, by agreement of counsel, was reserved to the trial court.

In a written opinion, dated June 27, 1960 (R. 25a) (reported at 185 F. Supp. 818), the trial judge found the plaintiff entitled to maintenance of $9,012.00.

As to the jury verdict, the defendant moved for a judgment in accordance with its motion for a directed verdict (Rule 50 [b], F. R. C. P.), and for a new trial (Rule 59 [a], F. R. C. P.) by timely notice. These motions were denied by the trial judge.

A timely appeal followed, which appeal was argued January 17, 1961. The opinion of the Court of Appeals is dated March 28, 1961, and is published at 288 F. 2d 595.

By petition, dated April 7, 1961, the defendant sought a rehearing by the Court of Appeals *en banc*. This was denied by an order dated April 19, 1961.

Reasons for Granting the Writ.

1. This Case Involves Extremely Important Questions Concerning the Interpretation and Application of Rule 49(b) of the Federal Rules of Civil Procedure Which Should Be Determined by This Court.

Clarification is necessary because the opinion of the Court of Appeals allowing a trial judge discretion to withdraw all interrogatories in the face of the jury's disagreement on a single interrogatory seems directly contrary to the very language of Rule 49(b).

The framers of the Civil Rules attempted by the studied use of the permissive word "may" and the mandatory word "shall" to outline the areas where discretion was intended to be granted the trial judge and those areas where the trial court's action was limited by the direction of the mandatory language in Rule 49(b).

The first sentence of Rule 49(b) clearly allows the trial judge a discretion, whether to submit questions of fact to a jury or seek a general verdict (see *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54 (2 Cir.), *cert. denied*, 335 U. S. 816 [1948]) for the rule provides that the trial court "*may* submit to the jury."

The second sentence of the rule, on the other hand, uses the directive "shall". This sentence requires the trial judge to "give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict" (an indication, certainly that the framers did not expect the interrogatories to be of "pristine clarity" [see *Ratigan* v. *New York Central R. R.*, 2 Cir., decided June 5, 1961—not yet officially reported]).

Immediately thereafter the rule requires that the trial judge "shall direct the jury both to make written answers and to render a general verdict." The rule does not here permit the trial judge to withdraw interrogatories from the jury's consideration. He must require "written answers" to the interrogatories and is given no discretion to do otherwise.

The next sentence of Rule 49(b) which deals with the return of answers to the interrogatories and a general verdict by the jury again emphasizes a limitation on the trial judge's discretion. If the answers and the general verdict are harmonious, the trial judge "shall" direct the entry of judgment. However, if the factual answers are consistent with each other but inconsistent with the general verdict, the court has discretion to take one of *three* courses, viz.: (a) direct judgment in accordance with the factual answers, (b) return the jury for further deliberation, or (c) order a new trial. This is the limit of the trial court's discretion and the discretion afforded by the Rule does not include the alternative of withdrawing an interrogatory if the jury cannot agree on an answer, as the trial judge did in this case.

The last sentence of the Rule contains both the mandatory direction "shall not" and the discretionary word "may". Again this discretion is limited to alternatives which do not include the withdrawal of interrogatories. The trial judge's discretion is here limited to (a) returning the jury for further deliberation or (b) ordering a new trial.

If the language of the rule is intended to mean what it says, a trial judge does not have the discretion to relieve a jury of its duty to make a written answer to each interrogatory of fact which has been submitted for its consideration.

Moreover, although all of the permissive alternatives have been carefully outlined, none of these alternatives in the permissive clauses of Rule 49(b) gives a trial judge the discretion (permission) to withdraw interrogatories if he feels that the jury's answers thereto may be inconsistent with a general verdict, or for any other reason. *Union Pacific R. R.* v. *Bridal Veil Lumber Co.*, 219 F. 2d 285 (9 Cir. 1955), *cert. denied*, 350 U. S. 981 (1956).

The opinion of the Court of Appeals here, on the other hand, adds an alternative not found in Rule 49(b), which would grant federal trial judges a discretion to withdraw an interrogatory where the jury cannot reach a unanimous answer. This will cause confusion in the application of factual verdicts under Rule 49 in federal trial courts.

2. The "Fact" or "Special" Verdict Has Been Recognized as an Effective Means of Mitigating the Most Generally Criticized Weakness of the American Jury System as it is Administered in Both Federal and State Courts. This Court Should Express Itself as Being in Favor of the Use of "Special" Verdicts Under Rule 49 and Thus Encourage Their Use. The Opinion of the Court of Appeals Tends to Discourage the Use of Rule 49.

A most thorough study of the jury system under the common law in England and in the United States is contained in the opinion of the late Judge Frank in the case of *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54 (2 Cir.), *cert. denied*, 335 U. S. 816 (1948).

In the *Skidmore* opinion, Judge Frank acknowledged that passion, prejudice and sympathy are always present in the minds of jurors and remain there regardless of how erudite or simple may be the instructions and admonitions of the trial judge. Every judge and lawyer who has ever

participated in a jury trial will agree that an instruction to a jury to act without passion, prejudice and sympathy, is a legal opiate to the conscience of the American jury system in civil cases. In fact, the attorneys for injured plaintiffs pride themselves in the expertness with which they use guile in "convincing a jury" by playing upon these passions.

If the jury trial is to be more than a battle of lawyers' wits and in truth a fair trial of factual issues there must be some means of testing the accuracy and fairness of the jury verdict. This has long been the recognized purpose of Rule 49.

It is completely contrary to the acknowledged purpose of Rule 49 to give a trial judge discretion to withdraw interrogatories containing factual issues from a jury because the jury is unable to agree on an answer to the interrogatory embodying that issue. If a jury cannot agree on a factual issue which has been submitted to it by the trial judge, without objection by any party to the action, then, regardless of the expense or the amount of time consumed, that factual issue should be submitted to another jury for its new and independent determination.

3. In Addition to the Importance of the Issues Concerning the Interpretation and Application of Rule 49(b) and the Necessity of a Clear Expression by this Court on the Fundamental Problem of the Proper Administration of the "Factual Verdict" Means of Testing Jury Trials this Case Presents a Question of the Fairness of the Action of the Court of Appeals in Formulating an Opinion Which is Based on a Premise Wholly Contrary to the Record.

The opinion of the Court of Appeals is based on the finding that "[t]he withdrawal of all the questions was for

the purpose of eliminating the confusion caused by the formulation of an improper question." The "impropriety" of the question is said to be its ambiguity.

As previously noted in the *Statement* portion of this petition: (1) Neither party objected to any of the eight interrogatories. (2) The first interrogatory contained the only facts upon which the plaintiff relied for causation. (3) After a supplemental instruction on the meaning of a word in the first interrogatory, the trial court thought the question was "quite clear" but invited a further request for clarity from the jury, if necessary. (4) No such request was made. On the contrary, *the jury could not* reach unanimity on the issue of fact in question one. (5) The trial judge did not withdraw the entire eight interrogatories to "eliminate confusion" but to relieve the jury of its obligation of answering a fundamental question of fact.

The Court of Appeals abandoned the case tried in the district court and invented a new case by finding that the trial judge used "good judgment" and did not abuse his "discretion" in withdrawing the interrogatories from the jury because the first interrogatory was ambiguous although this same trial judge said he thought this interrogatory was "quite clear". It will lead to hopeless confusion for a Court of Appeals to approve the "judgment" of a trial judge who made no such judgment—to approve the exercise of a discretion when no such discretion was intended to be exercised.

4. The Defendant Has Been Deprived of its Right to Trial by Jury Under the Seventh Amendment of the Constitution of the United States.

It is, of course, incontestible that the plaintiff had the burden of establishing the affirmative of the factual issue

contained in interrogatory one. Consequently, the determination of the jury that it was unable to agree on an answer to the first interrogatory was equivalent to a finding that the plaintiff had failed to meet its burden of proof in this all important regard. *Murphy* v. *Overlakes Freight Corp.*, 117 F. 2d 342 (2 Cir., 1949), *cert. denied*, 339 U. S. 913 (1950). Such a failure on the part of the plaintiff should have been dispositive of the case under Rule 49(b).

As this court said in *Dimick* v. *Schiedt*, 293 U. S. 474, 486 (1934):

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

When the trial judge withdrew all interrogatories from the jury after the jury was expressly unable to agree on one factual issue he ignored an answer of the jury just as did the trial judge in the recent case of *Ratigan* v. *New York Central R. R.*, 2 Cir., decided June 5, 1961 (not yet officially reported), when he found two of the answers of the jury to questions of fact under Rule 49(a) as being "surplusage." In the same Court of Appeals Judge Friendly in dissent said:

> ". . . neither the district court nor we are permitted to guess which of the two answers the jury would have altered if the alleged inconsistency had been promptly explained. The ruling of the district judge, now affirmed by my brothers, seems to me to deprive the Central of its right to a jury trial. See *Union Pacific R. Co.* v. *Bridal Veil Lumber Co.*, 219 F. 2d 825, 831-32 (9 Cir. 1955), cert. denied 350 U. S. 981 (1956)."

5. THERE IS A CONFLICT BETWEEN THE OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN THIS CASE AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF *Union Pacific R. R.* v. *Bridal Veil Lumber Co.*, 219 F. 2d 825, 831-32 (9 Cir. 1955), *cert. denied*, 350 U. S. 981 (1956) ON THE LIMITATION OF THE DISCRETION OF A TRIAL JUDGE WHEN A JURY IS UNABLE TO AGREE ON A SPECIAL INTERROGATORY.

In the *Bridal Veil* case the trial judge had submitted seven interrogatories to the jury pursuant to Rule 49(a). Each of these interrogatories sought an answer as to whether the defendant was negligent in various respects as defined in each question. The jury in that case answered "No" to six questions and stated it could not agree on an answer to one of the questions. The trial judge, refusing to consider the disagreement, entered judgment for the defendant. The Court of Appeals for the Ninth Circuit reversed and in so doing defined its concept of the powers of a trial judge in the face of a jury disagreement as follows (p. 831):

> "But when the jury is in disagreement as to one question, when it is readily apparent that the failure to answer one question is not an oversight, and it is apparent the disagreement has lasted for some time, it is peculiarly the function of the trial judge to decide whether to discharge the jury or, within the limits of legitimate wheedling try to get the jurors to agree on an answer."

The Court of Appeals was paraphrasing the last sentence of Rule 49(b) which relates to instances where answers are inconsistent with each other and wherein the rule directs that the trial judge ". . . shall not direct the entry of judgment but may return the jury for further

consideration of its answers and verdict or may order a new trial".

The Court of Appeals for the Ninth Circuit in the *Bridal Veil* case emphasized its holding concerning the limitation of a trial judge's discretion where the jury has disagreed on an interrogatory at page 832, as follows:

> "To do other than send the case back for a new trial when decision on a vital issue by the jury is missing would deprive the parties of the jury trial to which they are entitled constitutionally".

6. THERE IS A CONFLICT BETWEEN THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN THIS CASE AND THE COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THE CASE OF *Walz* v. *Fidelity-Phoenix Fire Ins. Co. of N. Y.*, 10 F. 2d 22 (6 CIR.), *cert. denied*, 271 U. S. 665 (1926), CONCERNING THE PROPRIETY OF A TRIAL JUDGE IN EXPERIMENTING WITH THE JURY DURING DELIBERATION AFTER THE JURY HAS INDICATED ITS INABILITY TO REACH A UNANIMOUS DECISION.

In the *Walz* case, the jury had deliberated about 48 hours and the jurors were convinced they could not agree. Counsel for each party stated that each thought an agreement seemed hopeless and suggested to the trial judge that the jury be discharged. The trial judge, however, felt that certain witnesses who were present should have been called to testify and insisted upon recalling the jury to hear these additional witnesses. Thereafter, the jury answered two special questions and the trial judge entered judgment for the defendant.

The Court of Appeals for the Ninth Circuit reversed, holding that action by the trial judge after the jury had disagreed "will tend to encourage experimentation" (p. 23).

It is respectfully submitted that the opinion of the Court of Appeals for the Second Circuit in this case will do much more to encourage "experimentation" by federal and state trial judges during jury deliberation than the action taken by the trial judge in the *Walz* case.

The opinion below suggests that if a jury cannot agree on a question of fact, that question and all others may be withdrawn, if the question on which the jury disagrees is "ambiguous" even though the jury, at no time, says it is unable to agree because it does not understand the question.

But the opinion of the Court of Appeals herein warns trial judges that if the interrogatories are "material and proper" they may not withdraw these interrogatories if the jury has only deliberated a "few hours" and the trial judge withdraws the questions and "shortly thereafter" the jury returns a verdict for the plaintiff. In such an instance, the Court of Appeals says it would be an abuse of discretion. The Court of Appeals cites *Ermentraut* v. *Providence-Washington Ins. Co.*, 1897, 67 Minn. 451, 70 NW 572, in support of this statement, although the jury had deliberated a day and a half in that case without agreement before the questions were withdrawn from the jury's consideration.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph M. Cunningham,
Counsel for Petitioner.

Charles N. Fiddler,
Joseph P. Ritorto
and
Kirlin, Campbell & Keating,
Of Counsel.

Dated: New York, New York,
July 14, 1961.

APPENDIX.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

No. 171—October Term, 1960.

(Argued January 17, 1961 Decided March 28, 1961.)

Docket No. 26463.

Julio Diniero,

Plaintiff-Appellee,

against

United States Lines Company,

Defendant-Appellant.

Before:

Medina, Friendly and Smith,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, Judge.

Defendant, shipowner, United States Lines Company, appeals from a judgment in favor of Julio Diniero, a Junior Third Assistant Engineer, entered upon the verdict of a jury in an action to recover damages for personal injuries alleged to have been sustained aboard the SS. *Pioneer Land* due to the unseaworthiness of the vessel and the negligence

of the shipowner. The award by the trial judge for maintenance and cure is not involved on the appeal. No opinion below. Affirmed.

EDWARD J. MALAMENT, New York, N. Y. (LEE PRESSMAN and STANDARD, WEISBERG, HAROLDS & MALAMENT, New York, N. Y., on the brief), for plaintiff-appellee.

JOSEPH M. CUNNINGHAM, New York, N. Y. (JOSEPH P. RITORTO and KIRLIN, CAMPBELL & KEATING, New York, N. Y., on the brief), for defendant-appellant.

MEDINA, Circuit Judge:

Between April 6, and September 30, 1954, Julio Diniero, a Junior Third Assistant Engineer aboard the SS. *Pioneer Land*, owned by United States Lines Company, claimed to have suffered such repeated strains in his back in the performance of his duties as to cause a ruptured disc with resultant pain and suffering, culminating some years later in a fusion operation and the removal of the disc. According to Diniero's testimony, there was a blow-down valve located below a floor plate and it was his duty to reduce leakage in the vessel's fresh water reserves by the operation of this valve. There was a slot in the floor plate and normally the valve could be opened or closed as circumstances required by using a reach rod. For a variety of reasons we need not describe in detail, but which include the absence of a reach rod and defects in the valve, Diniero said the only way he could operate the valve was by removing the deck plate, crouching down and moving the wheel of the valve by the use of a wrench. He claimed the injuries to his back were the effect of repeatedly operating the valve under these difficult conditions. The shipowner controverted all these charges, and claimed there was

nothing wrong with the valve, nor any necessity to remove the floor plate or to use a wrench. The eight day trial was devoted to the hearing of many witnesses and the reading of some depositions relative to the controverted issue of liability, and there was also considerable medical proof on the general subject of whether Diniero's trouble was due to a long continued condition caused by a degenerative disc disease and having no relation whatever to the operation of the blow-down valve, rather than to a ruptured disc.

At the close of the evidence the trial judge submitted the case to the jury in a wholly unexceptionable charge. In an endeavor to assist the jury in its deliberations, however, and pursuant to F. R. C. P., Rule 49(b)[1] he submitted eight questions to be signed and returned as the verdict of the jury. The last two were in the form of a general verdict for plaintiff or defendant, questions 2 to 6 inclusive were in the common form relating to unseaworthiness, negligence, contributory negligence and proximate cause. The trouble was caused by question number 1, as follows:

---

[1] Rule 49(b) provides:

"The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

"Did the plaintiff injure himself aboard the Pioneer Land because in operating the blow-down valve he had to remove the floor plates, then crouch and exert physical effort with a wrench and not his hand to stop it from leaking?

Answer yes or no."

After some hours of deliberation and the receipt of a number of communications from the jury, the trial judge withdrew all the questions, told the jury to disregard them and bring in a general verdict in the usual form; and, after further deliberations the jury brought in a verdict in favor of the seaman for $46,150. The claim for maintenance and cure had been reserved for later determination by the court and, in an opinion, not reported, in lieu of findings of fact and conclusions of law, the trial judge allowed Diniero $9,012. The shipowner appeals and the only question raised on the appeal is whether the trial judge committed error by the withdrawal of the questions originally submitted.

The position of the shipowner is that F. R. C. P., Rule 49(b) authorizes the submission of written interrogatories but does not authorize the withdrawal of such interrogatories, after they have once been submitted and the jury has commenced its deliberations thereon. The shipowner further argues that question number 1 related to "one or more issues of fact the decision of which is necessary to a verdict," and that, even if there be some power in the trial judge to withdraw interrogatories under certain circumstances, it was a clear abuse of discretion to withdraw a proper and material interrogatory, relating to an issue that must necessarily be decided in plaintiff's favor, if plaintiff was to recover any damages whatever. To permit such withdrawal, the shipowner claims, would defeat the very purpose of F. R. C. P., Rule 49(b), and smooth the way for a reluctant jury, unable to agree on the facts basic

to recovery, to do "popular justice" through the medium of "an old-fashioned verdict."

The question is important, and, so far as we are aware, has never been decided by any federal court, although there are many state court decisions on various phases of the general subject. We hold, under F. R. C. P., Rule 49(b), that from the expressed power to submit interrogatories there is to be implied power to withdraw these same interrogatories in proper cases. Just as the trial judge may in his discretion submit interrogatories, so in his discretion he may withdraw them; but his ruling withdrawing the interrogatories is reviewable by us for abuse of discretion. In this case we think question number 1 was ambiguous, it certainly was not understood by the jurors, and the attempted explanation, to which we shall presently return, not only failed to clear up the ambiguity, but to some extent increased it. Under these circumstances we hold it was not an abuse of discretion to withdraw all the questions and authorize the jury to render a general verdict.

The jury commenced their deliberations at 2:45 P. M. At 5:40 P. M. the trial judge received a note from the jury reading: "Your Honor, could we ask for your interpretation of the word 'had' in the second line, first question? Did the plaintiff injure himself?"

Appellant's counsel assures us that the question and the explanation given by the trial judge is just as simple as "whether the plaintiff was injured as he claimed," or, in other words, whether he was injured in the manner described by him in his testimony. What the trial judge said, however, is as follows:

> "What I was trying to find out by the first question was whether or not plaintiff injured himself on board this ship, assuming that he had to remove the plates, assuming that he had to crouch down, and assuming he exerted this pressure with the wrench instead of his hand?

So in answer to your specific question as to the interpretation of the word 'had' it means that I assumed that he had to remove the plates, and he had to do this, and he had to do that. I didn't mean to take away from you the question as to whether he did in fact have to do that. In other words, the purpose of the question is to find out whether the plaintiff injured himself on board the ship in the manner that he described. The defendant claims that he did not. So the first question that I wanted answered was did he injure himself aboard the ship by doing what he said he did?

If you find that he didn't remove the plates or he didn't bend down, or he didn't crouch, or he didn't have to, or he didn't do it, those questions will be answered as you go on further down by your answers to the other questions.

But in my first question I assumed as a fact, accepted the plaintiff's testimony, that he had to bend down, that he had to crouch, that he had to remove the plates.

What I wanted to find out was, assuming all of that, did he injure himself on board the Pioneer Land.

Now I hope that is clear. If it isn't, you can write me another note."

The jury retired again at 5:50 P. M. and returned with another note at 6:40 P. M. This note was not read to counsel until after the verdict was rendered, but no objection was made to the failure to read it. The trial judge merely said it related "to some disagreement." The note is as follows: "Your Honor, we cannot agree on question one. It appears there is no chance for agreement." Thereupon the trial judge withdrew all the questions from the consideration of the jury and asked the : to see if they could not agree on a general verdict.

Despite the trial judge's withdrawal of the interrogatories, the jury still could not soon reach agreement. At 9:22 P. M. the jury informed the trial judge that "it finds it impossible to arrive at a unanimous agreement in this case." The trial judge thereupon read a quotation from *Allen* v. *United States*, 1896, 164 U. S. 492, 501, and returned the jury for further deliberations at 9:30 P. M. Objection was noted to the withdrawal of the questions, but not to the sending of the jury back for further deliberations at 9:30. At 10:30 P. M. the verdict was announced and the jury polled.

There was an inherent ambiguity in question one, and it is plain enough that the explanation failed to remove the ambiguity. Under these circumstances we think it was not an abuse of discretion to withdraw the questions and give the jury an opportunity to agree upon a general verdict. As F. R. C. P., Rule 49(b) authorizes the submission of interrogatories to assist the jury in arriving at a verdict, it is reasonable and quite consistent with the broad powers of a federal trial judge to infer that in a proper case the interrogatories may be withdrawn. It was a matter of judgment whether to attempt some further elucidation of the question, or to declare a mistrial, or to withdraw all the questions and authorize a general verdict. We cannot say the decision made here under the circumstances of this case was wrong, particularly as the jury continued its deliberations from about 6:45 P. M. until 10:30 P. M., after the withdrawal of the questions.

Counsel have called many state court decisions to our attention. The weight of authority in these cases strongly supports our ruling that in proper cases interrogatories may be withdrawn.[2]

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[2] See *Longstean* v. *Owen McCaffrey's Sons*, 1920, 95 Conn. 486, 111 Atl. 788; *Watkins* v. *Mountain Home Co-op. Irr. Co.*, 1921, 33 Idaho 623, 197 Pac. 247; *Continental Life Ins. Co.* v. *Young*, 1888, 113 Ind. 159, 15 N. E. 220; *Fitts* v. *Badger Lumber & Coal Co.*, 1937, 146 Kan. 56, 68 P. 2d 631; *Florence Machine Co.* v. *Daggett*,

Moreover, most of these decisions agree that when proper and material interrogatories have been submitted to the jury it is error to receive a general verdict in the face of a disagreement among the jurors with respect to one of the questions.[3] The reason for this is that the answers to material questions are a necessary basis for the general verdict, and, if there is disagreement with respect to one or more of such questions, the general verdict has no sound foundation to rest upon. Examples are cases where the jury disagrees with respect to interrogatories relating to the contributory negligence of plaintiff. Where the questions on which the jury disagrees are not material or necessary to the verdict the result is different.[4]

1883, 135 Mass 582; *Wavle* v. *Michigan United Rys.*, 1912, 170 Mich. 81, 135 N. W. 914; *Poor* v. *Madison River Power Co.*, 1910, 41 Mont. 236, 108 Pac. 645; *Robinson* v. *Palatine Ins. Co.*, 1901, 11 N. M. 162, 66 Pac. 535; *New York County Nat'l Bank* v. *American Surety Co.*, N. Y. App. Div., 1st Dep't, 1902, 69 App. Div. 153, 74 N. Y. Supp. 692, affirmed without opinion, 1903, 174 N. Y. 544, 67 N. E. 1086; *Taylor* v. *Ketchum*, 1868, 28 N. Y. Super. Ct. (5 Rob.) 507, 35 How. Pr. 289; *La Fayette* v. *Bass*, 1926, 122 Okla. 182, 252 Pac. 1101; *Rohr* v. *Isaacs*, 1880, 8 Ore. 451; *Robinson* v. *Silver Lake Ry. & Lumber Co.*, 1931, 163 Wash. 31, 299 Pac. 356; *McKelvey* v. *Chesapeake & O. Ry.*, 1891, 35 W. Va. 500, 14 S. E. 261.

[3] *Arkansas Midland Ry.* v. *Canman*, 1890, 52 Ark. 517, 13 S. W. 280; *Tourtelotte* v. *Brown*, 1892, 1 Colo. App. 408, 29 Pac. 130; *Longstean* v. *Owen McCaffrey's Sons, supra: Tober* v. *Pere Marquette R.R.*, 1920, 210 Mich. 129, 177 N. W. 385; *Eischen* v. *Chicago, M. & St. P. Ry.*, 1900, 81 Minn. 59, 83 N. W. 490; *Doom* v. *Walker*, 1884, 15 Neb. 339, 18 N. W. 138; *Ebersole* v. *Northern Central Ry.*, N. Y. Gen'l Term, 3d Dep't, 1880, 23 Hun 114; *Palmetto Fertilizer Co.* v. *Columbia N. & L. Ry.*, 1914, 99 S. C. 187, 83 S. E. 36; *Stylow* v. *Milwaukee Elec. Ry. & Transp. Co.*, 1942, 241 Wis. 211, 5 N. W. 2d 750; *Biersach* v. *Wechselberg*, 1931, 206 Wis. 113, 238 N. W. 905.

[4] *O'Connell* v. *United Railroads*, 1912, 19 Cal. App. 36, 124 Pac. 1022; *Wakefield* v. *Wakefield Water Co.*, 1903, 182 Mass. 429, 65 N. E. 814; *Murray* v. *New York Life Ins. Co.*, 1884, 96 N. Y. 614; *Garfield* v. *Blair*, N. Y. Gen'l Term, 4th Dep't, 1890, 10 N. Y. Supp. 340; *May* v. *Szwed*, 1941, 68 Ohio App. 459, 39 N. E. 2d 630; *Smith* v. *Cushman Motor Delivery Co.*, 1936, 54 Ohio App. 99, 6 N. E. 2d 594; *Russell* v. *Oregon R. & Nav. Co.*, 1909, 54 Ore. 128, 102 Pac. 619.

Other cases present the problem in its simplest form. After the submission of material and proper interrogatories, there is a delay of a few hours and the trial judge of his own motion, or on the application of plaintiff's counsel, calls in the jury, withdraws the questions, tells the jury to bring in a general verdict over the objection of defendant's counsel, and shortly thereafter the jury returns a verdict for the plaintiff. This has been held to be an abuse of discretion and ground for reversal. *Ermentraut* v. *Providence-Washington Ins. Co.*, 1897, 67 Minn. 451, 70 N. W. 572; *McKelvey* v. *Chesapeake & O. Ry.*, *supra*. See also *Sun Mut. Ins. Co.* v. *Dudley*, 1898, 65 Ark. 240, 45 S. W. 539. The reason is that the action of the trial judge would probably be prejudicial to defendant. See *Ermentraut* v. *Providence-Washington Ins. Co.*, *supra*, at pp. 572-3; *McKelvey* v. *Chesapeake & O. Ry.*, *supra*, at p. 263. This is a good general rule, and we agree with it. But it has no application to the case before us now, as the interrogatory causing all the difficulty here was unclear and ambiguous. The withdrawal of all the questions was for the purpose of eliminating the confusion caused by the formulation of an improper question. And it is to be noted that a confusing and improperly worded interrogatory cannot fairly be considered a "material" question, or one the answer to which "is necessary to a verdict." Under the circumstances it was, we think, good judgment to withdraw all the questions. Certainly we cannot say to do so was an abuse of discretion.

Affirmed.

ORDER OF COURT OF APPEALS ON PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

JULIO DINIERO,
Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY,
Defendant-Appellant.

PETITION FOR REHEARING.

KIRLIN, CAMPBELL & KEATING,
New York, N. Y. for defendant-appellant.

Petition for rehearing is denied.

HAROLD R. MEDINA
HENRY J. FRIENDLY
J. JOSEPH SMITH
U. S. C. JJ.

PETITION FOR REHEARING *in Banc.*

All of the active judges concurring, the petition for rehearing *in banc* is denied.

April 19, 1961

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IN THE

Supreme Court of the United States

October Term, 1961

No. 231

UNITED STATES LINES COMPANY,
Petitioner,

against

JULIO DINIERO,
Respondent.

BRIEF OF RESPONDENT, JULIO DINIERO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANDARD, WEISBERG, HAROLDS & MALAMENT,
38 Park Row,
New York, N. Y.,

LEE PRESSMAN,
50 Broadway,
New York, N. Y.,

Counsel of Record for Respondent.

LOUIS R. HAROLDS,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1961

No.

UNITED STATES LINES COMPANY,

Petitioner

against

JULIO DINIERO,

Respondent.

BRIEF OF RESPONDENT, JULIO DINIERO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

The facts and issues were adequately and correctly set forth in the opinion of the Court of Appeals herein, as distinct from the manner in which United States Lines Company has attempted to set them forth in its petition.

This case involves the inherent recognized power of a Trial Judge to correct and simplify the method by which he submits a case for determination by the jury, as a matter of judicial discretion, within the framework, spirit and intent of F. R. C. P. 49(b).

It does not involve a Judge taking a case away from the jury; or any Constitutional or other federal problem of overriding importance to the administration of justice; nor does it involve a matter as to which there is a conflict among the Circuits.

However, petitioner's brief tries hard to make it appear that all of these matters are involved here, in the continued

hope that in this way, it might eventually obtain a new trial in the seaman's personal injury suit, in which the jury returned a general verdict in favor of the injured workman, and against the petitioner steamship company.

We will show that this is not the type of case in which the Supreme Court should grant certiorari.

POINT I

The decisions uniformly hold that a federal trial judge has inherent power to withdraw an improper interrogatory, and to clarify or simplify its instructions to the jury, in order to assist it to arrive at a verdict.

Interrogatory No. 1 was both ambiguous and erroneous, as was recognized by the trial judge and the unanimous verdict of the Court of Appeals. On either count the trial judge had the power to correct, alter, and amend his instructions to the jury by withdrawing the improper interrogatory.

In 89 Corpus Juris Secundum "Trial", Section 550, it is stated:

> "If the court inadvertently submits questions which, on mature deliberation, it concludes are improper, it has the inherent power to withdraw such questions. An interrogatory which does not serve the purpose and functions of interrogatories may, at any time before answer, be withdrawn."

In *Allis* v. *United States* (1894), 155 U. S. 117, 123, 15 S. Ct. 36, the Court approved the standard practice of recalling the jury to recharge them or simplify the issues stating:

> "It is a familiar practice to recall a jury, after they have been in deliberation for any length of time, for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those

> difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment."

In *Goode* v. *Ramey* (1932), 48 S. W. 2d 719, the jury had deliberated for 1½ days when they reported to the trial judge that they could not agree on questions 6 and 7. After inquiring as to the nature and cause of their disagreement the court retired the jury for further deliberation. Thereafter the court recalled the jury, submitted a different and amended question 6 and withdrew entirely question 7. The court held this action was not error.

> "We have found nothing in our statutes that inhibits the trial court on his own motion to correct or modify a charge which has been given to the jury. Indeed, as said in R. C. L. vol. 14, p. 812, the consequences would be highly mischievous if such right did not exist." (p. 722)

In *Poor* v. *Madison River Power Co.* (1910), 41 Mont. 236, 108 Pac. 645, the court upheld the acceptance of a general verdict despite the jury's failure to answer an interrogatory which incorporated several questions. Not unlike the first interrogatory here, it read:

> "Did the witness Barclay, in the presence of Amos R. Howerton, make an experiment and at the same time explain to said Howerton, the dangerous nature of the wire on which Howerton was killed?" (p. 648)

The Court stated:

> "The direct tendency of such an interrogatory was to confuse the jury * * * and, if upon further consideration of it the court had formally withdrawn it from the jury, no valid objection could have been taken to its action." (p. 648)

In *Matthews* v. *Town of Sigel* (1913), 152 Wisc. 123, 139 N. W. 721, the court held that no error was committed when

the trial judge withdrew a special interrogatory relating to an evidentiary fact, stating:

> "It is the duty of trial courts to correct or perfect the verdict at any time before it is accepted from the jury as the verdict in the case, provided it is done in such a manner as not to prejudice the rights of parties." (p. 724)

In *Robinson* v. *Palatine Ins. Co.* (1901), 11 N. M. 162, 66 Pac. 535, 538, the court stated:

> "• • • we further hold that if the court inadvertently submits to the jury questions which, on mature deliberation, it concludes are not proper ones to be submitted to them, it has the inherent power to withdraw such questions from their consideration • • •." (p. 538)

In short, state courts have consistently upheld the withdrawal before verdict of improper interrogatories, *Continental Life Ins. Co.* v. *Yung* (1888), 113 Ind. 159, 15 N. E. 220, 222; which do not serve the purpose and function of interrogatories, *Longstean* v. *Owen McCaffrey's Sons* (1920), 95 Conn. 486, 111 Atl. 788, 794; or which embrace an evidentiary fact, the answer to which would not be controlling on the general verdict, *Robinson* v. *Silver Lake* (1931), 163 Wash. 31, 299 Pac. 356, 358; *Matthews* v. *Town of Sigel* (1913), 152 Wis. 123, 139 N. W. 721, 724; *Wavle* v. *Michigan United Ry. Co.* (1912), 170 Mich. 81, 135 N. W. 914, 919.

The action of the trial court below in withdrawing the first interrogatory because it did not wish, under the circumstances, to rephrase it, and consequently its decision simultaneously to withdraw all the other interrogatories, was a reasonable exercise of discretion, under the circumstances of this case.

POINT II

The withdrawal of all the interrogatories did not precipitate an immediate verdict, and the record of the jury's deliberation thereafter negates a verdict under judicial duress or one based on sympathy or prejudice.

The time-table chronology of events, establish beyond cavil that the judge's action could not have prejudiced any of the rights of either party.

2:45 P. M. jury commenced deliberations (15a).

5:45 P. M. Judge Murphy's attempted clarification of "had" in Interrogatory One (15a).

6:40 P. M. Withdrawal of interrogatories (18a).

9:22-9:30 P. M. "Allen" charge to Jury (20a-22a).

10:30 P. M. Jury renders verdict (22a).

While no reported federal cases deal directly with the application of the Harmless Error doctrine to withdrawal of an interrogatory, the mandate of Rule 61 F. R. C. P. that no judgment shall be disturbed for "any error or defect in the proceeding which does not affect the substantial rights of the parties", clearly applies herein.

F. R. C. P. 61:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The federal cases dealing with supplemental and "Allen" charges show that to constitute reversible error it must be shown that the action of the judge "blasted" the jury to action by judicial coercion in disregard of the jury's fact-finding function. Such is not the situation in the instant case.

In *Silverman* v. *Travelers Ins. Co.* (5 Cir. 1960), 277 F. 2d 257, the appellants objected to the so-called "dynamite charge" or "telescopic charge" the trial judge gave in his supplementary charge to the jury. The Fifth Circuit affirmed the jury verdict and held that the judge's supplementary charge did not prejudice the appellant:

> "Although it is better practice to avoid supplementary charges, the propriety of such charges rests largely in the discretion of the trial judge. We find that the charge did not blast the jury into action in any way prejudicial to the plaintiffs and that the trial judge did not blur the issues by the alleged telescoping of charges." (p. 264)

The fact that the jury here reported, "Your Honor, we cannot agree on question one. It appears that there is no chance for agreement. Foreman." (24a) was not conclusive upon the court, any more than any other report from a jury that it cannot agree. It is precisely where the jurors have reported "deadlock" that the appellate courts have sustained the further efforts of the trial judge to obtain a verdict.

In *Orthopedic Equipment Co.* v. *Eutsler* (4 Cir. 1960), 276 F. 2d 455, 463, Sobeloff, *C. J.*, stated:

> "Nor was the Allen charge inappropriate, as the defendant argues, simply because the foreman of the jury had reported the jurors hopelessly deadlocked. As a practical matter, the charge is customarily given only when the jury appears to have encountered difficulties in reaching unanimity. If the distinction suggested by the defendant were correct, the court would be precluded from giving the charge in the

> very circumstances when it is needed most. Moreover, the decisional law supports the use of the instruction in a case in which the jury has previously indicated its difficulty." (p. 463)

In *Wilson* v. *Southern Farm Bureau Casualty Co.* (5 Cir. 1960), 275 F. 2d 819, the jury foreman reported to the judge that the jury was unable to agree ("impossible"). The judge thereupon gave the *Allen* case charge, to which counsel for both parties objected, and 14 minutes later the jury returned with a verdict for the defendant. The court affirmed the judgment and held that the "impossibility" of jury agreement did not deprive the trial judge of discretion to continue the deliberations and act to avoid a mistrial.

> "The appellant insists that, when the foreman advised the court that it was 'impossible' to arrive at a verdict, it became the court's duty to enter an order of mistrial. Clearly, however, it was for the court, in the exercise of its informed discretion, to determine when the deliberations had proceeded long enough. The charge given by the court was modeled upon that approved in Allen v. United States * * *." (p. 823)

The interrogatories in the instant case were withdrawn four hours after they had been given but no quick verdict resulted. It was another four hours before the jury reached its obviously deliberated general verdict (22a-23a), and then only after the trial judge had given the traditional *Allen* charge (21a-22a). Here, the withdrawal of the interrogatories, obviously did not galvanize the jury into a precipitous decision.

POINT III

There is no conflict between the opinion of the Court of Appeals for the Second Circuit, and the Courts of Appeals of any other circuit.

Petitioner claims that *Union Pacific R.R.* v. *Bridal Veil Lumber Co.*, 219 F. (2d) 825 (C. A. 9th, 1955), cert. den. 350 U. S. 981 (1956) is in conflict with the opinion of the Court of Appeals for the Second Circuit in this case. We believe that it has misread that case. The *Bridal Veil* case involved a subrogated claim to recover damages for negligence, based on a railroad crossing accident. The jury was given a series of special written interrogatories. It failed to reach agreement on one question, and failed to answer another, although the rest of the interrogatories were answered. Based on the answers which the jury did give, the Trial Judge felt justified in going ahead and entering judgment. On appeal, this was held to be error, for the unanswered interrogatories posed vital factual questions which required determination by the jury, not the Court. In that case, the unanswered interrogatories involved were not ambiguous, nor did the Trial Judge make any attempt to withdraw them. Unlike the case at bar, the Judge there did not send the jury back, nor did he request that it return a general verdict. In other words, in that case, the Trial Judge substituted his own determination on factual matters which were within the jury's province. This was correctly held to be error, requiring the case to be sent back for a new trial. In reaching that conclusion, the Court recognized the general rule, when it stated at page 831:

> "• • • But when the jury is in disagreement as to one question, when it is readily apparent that the failure to answer one question is not an oversight, and it is apparent the disagreement has lasted for some time, it is peculiarly the function of the trial judge to decide whether to discharge the jury or, within the limits of legitimate wheedling, try to get the jurors to agree on an answer. It may be assumed

> that counsel for Union Pacific, outside the presence of the jury, could have made a request to the court that the jury be returned to its room for further deliberation; yet under the circumstances it cannot be said that a failure to make such a request was the waiver of a right. * * * "

Petitioner also incorrectly claims that there is a conflict between the opinion of the Court of Appeals in the instant case, and that of the Court of Appeals for the Sixth Circuit in *Walz* v. *Fidelity-Phoenix Fire Insurance Co. of N. Y.*, 10 F. (2d) 22 (C. A. 6th, 1926), cert. den. 271 U. S. 665 (1926). Here also, there is no conflict. The *Walz* case involved an action to recover for a fire loss under a policy. The jury was out deliberating for two days, and then announced that it could not reach agreement. Counsel for both sides agreed that the jury was hopelessly deadlocked and should be discharged. Nevertheles, the Trial Judge directed that certain additional witnesses be brought in to testify before the jury, stating that the Court would not permit evidence to be suppressed. The newly produced witnesses then testified for the first time, following which the jury rendered a verdict. On appeal, this procedure was held to constitute error, because (a) the attorneys had a right to decide which witnesses they wanted to call, without being accused of suppressing material evidence; and (b) if the Trial Judge wished the witnesses to be heard, he should have directed that they be called to testify *before* the case was submitted to the jury, not *after* the jury had already been deliberating for over forty-eight hours.

As can be seen, the *Walz* case, like the *Bridal Veil* case, did not involve any question of whether a Trial Judge has a discretionary right to withdraw an ambiguous interrogatory, and then direct the jury to return a general verdict. On that issue there is no conflict in the Circuits.

POINT IV

The power of a Trial Judge to exercise the discretion granted him by Rule 49(b) of the Federal Rules of Civil Procedure, should not be whittled down.

The power to withdraw is implicit in the very provisions of Civil Rule 49(b).[1] It need not be derived only from the initial discretion "The court may submit". It is also to be inferred particularly from the expressed additional discretion vested in the court " • • • When the answers are consistent with each other but one or more is inconsistent with the general verdict, • • • When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court • • • may return the jury for further consideration of its answers and verdict • • •."

Answers to interrogatories which are inconsistent with each other or with the general verdict, necessarily reflect a jury's failure to understand either the issues, the court's

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[1] R. C. P. 49(b) "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

oral charge, the meaning of the interrogatories, or their legal effect. Under Rule 49(b) the court may explain to the jurors the nature of their inconsistent findings, and direct the jury to reconsider and reconcile them.[2] If this be so, is it not an *a fortiori* conclusion that the judge who may explain and return inconsistent findings to the jury to save a verdict or avoid a new trial, may, for the same reasons, withdraw the interrogatories before the jury brings in its verdict?

In *Wells Truckaways* v. *Burch*, *supra*, the jury came in with two verdicts—one for the plaintiff for $50,000 and one for the defendant for $4,982.81 on the counterclaim. The court explained to the jury that if it found for the defendant on the counterclaim based on plaintiff's breach of contract, it would foreclose their findings for the plaintiff. The judge sent the jury back to reconsider. The jury came back with a new single verdict of $45,017.19—the net figure of the two prior verdicts. The appellate court affirmed:

> "Assuming that the two verdicts were inconsistent, the intention of the jury was clear and the court was well within its discretion in refusing to enter the verdicts and directing the jury to resume its deliberations and clarify its verdict, rather than make the correction itself. 'Until a verdict has been received and recorded, it is not final and is subject to correction'." (p. 198)

Similarly, in *Bartholomew* v. *Universe Tankships*, *supra*, the jury agreed on a general monetary verdict for the plaintiff but left unanswered the six assigned interrogatories since they believed they did not have to answer

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[2] *St. Louis-San Francisco Ry Co.* v. *Simons* (10 Cir. 1949), 176 F. 2d 654, 660; *Wells Truckaways* v. *Burch* (10 Cir. 1957), 247 F. 2d 194, 198. See also, *Bartholomew* v. *Universe Tankships* (S. D. N. Y. 1957), 168 F. Supp. 153, 160, aff'd (2 Cir. 1959), 263 F. 2d 437, 448, sustaining the court's belated acceptance of answers to interrogatories after the general verdict.

them. The trial judge directed the jury to answer the special questions with the admonition that if they answered questions two or three in the negative "then there can be no verdict for the plaintiff" (p. 160). The jury then answered all the questions consistent with the general verdict. This court held that no error was commited by the trial judge.

In the leading case of *New York County National Bank* v. *American Surety Company of New York* (1st Dept. 1902), 69 App. Div. 153, 74 N. Y. Supp. 692, 695, aff'd (1903), 174 N. Y. 544, the jury rendered a general verdict for the plaintiff and answered the first and third special interrogatories, reporting disagreement on the second. The trial court withdrew the second interrogatory and entered judgment on the general verdict. This was affirmed on appeal, the court stating:

> "The jury rendered a general verdict in favor of plaintiff, and answered the first question in the affirmative, and the third in the negative, but were unable to agree on the second. The court accepted the verdict, and relieved the jury from answering the second question, to which ruling appellant's counsel excepted. This exception presents no error. It was discretionary with the court whether to require the jury to render a special verdict on any question, in addition to the general verdict, and it was equally discretionary with the court to withdraw one or all such special questions from their consideration." (p. 695)

In *Taylor* v. *Ketchum* (1868), 28 N. Y. Super. Ct. (5 Rob) 507, 514; 35 How. Prac. 289, 296, the trial court withdrew from the jury a special issue which it had previously framed for the jury to answer. The Superior Court found no error in the trial court's action, basing its decision on the discretionary nature of the submission of the issue to the jury in the first place.

> "The court withdrew the first question in writing from the consideration of the jury, and instructed

> them they need not answewer it. This, we think, the court had a right and power to do; and was purely a matter of discretion over which we have no control." (p. 514)

Other state jurisdictions have been in accord with Massachusetts and New York in upholding the trial judge's right to withdraw interrogatories.

In *Longstean* v. *Owen McCaffrey's Sons* (1920), 95 Conn., 486, 111 Atl. 788, 794, the Connecticut court stated:

> "When and to what extent they (interrogatories) shall be allowed is within the reasonable discretion of the trial court (cit. omitted).
>
> "It would follow that the trial court may at any time before answer is made by the jury withdraw them from the consideration of the jury; and, if the discretion thus exercised is reasonable, reversible error cannot be predicated upon this action." (p. 794)

In *Culver* v. *Lehigh Valley Transit Co.* (1936), 322 Pa. 503, 186 Atl. 70, the Pennsylvania court indicated that it would not insist upon having the jury answer a special finding and would permit the trial judge to enter judgment in accordance with the general verdict for the plaintiff, even though the special question related to what the jury found to be the negligence of the defendant.

In *Watkins* v. *Mountain Home Cooperative Irr. Co.* (1921), 33 Idaho 623, 197 Pac. 247, the Idaho court held that under its broad statutory discretionary provision (not dissimilar to Rule 49) whether to submit such questions:

> "is a matter within the discretion of the court • • •. Neither party can require it as a matter of right. That submission being discretionary, they can be withdrawn by the court at any time, before the special findings are given, and such withdrawal furnishes no ground for exception." (pp. 250-251)

See also *Fitts* v. *Badger Lumber & Coal Co.* (1937), 146 Kan. 56, 68 P. 2d 631, where the Kansas court upheld the withdrawal of special questions which the jury had failed to answer prior to rendering their general verdict.

In *LaFayette* v. *Bass* (1926), 122 Okla. 182, 252 Pac. 1101, the court affirmed the judgment entered on the general verdict for the plaintiff even though the jury had answered interrogatory one "can't agree", and such interrogatory was concededly material and proper. The Oklahoma court analyzed the situation as the same as failure to answer or withdrawal of the interrogatory and that under the discretionary State statute (similar in breadth and scope to Rule 49) the trial judge could withdraw the interrogatory from the jury.

In *Robinson* v. *Silver Lake Ry. & Lumber Co.* (1931), 163 Wash. 31, 299 Pac. 356, 358, the Washington court states the general rule giving its trial judges the power to withdraw interrogatories, as follows:

> "It is the settled law of this court that it is discretionary with the trial judge * * * to withdraw interrogatories theretofore submitted, and his action in that regard will not be reviewed except for abuse of discretion."

The court also pointed out that where, as in the case at bar, the general verdict encompassed the ultimate facts of the case for the jury to determine, the withdrawal of the interrogatories was clearly not error.

In *Poor* v. *Madison River Power Co.* (1910), 41 Mont. 236, 108 Pac. 645, 648, the Montana court, in addition to holding that the trial court has an inherent right to withdraw an improperly formulated interrogatory, also stated a broader rule:

> "Even had it been in proper form, its withdrawal could not have been made the ground of exception because, it being within the court's discretion to

> submit it in the first instance, it could likewise in its discretion withdraw it."

Likewise, in *Robinson* v. *Palatine Ins. Co.* (1901), 11 N. M. 162, 66 Pac. 535, after the jury reported that they could not answer the interrogatories, the trial judge withdrew them because they were improper. The Syllabus by the New Mexico Supreme Court states:

> "If the court submits questions to the jury, it can withdraw them, if it sees fit, from their consideration; and if the jury return a general verdict ignoring the questions, and the judge accepts the verdict as returned and discharges the jury, it is the same as though the court had refused to submit them in the first instance." (p. 535)

Radigan v. *New York Central Railroad Co.*, — F. (2d) — (C. A. 2d, decided June 26, 1961—not yet officially reported), was an *F.E.L.A.* case. The Trial Judge submitted specific written questions to the jury. He later realized that some of these questions were somewhat "unnecessary", "improper", and even "inconsistent". The majority of the Court held that the Trial Judge had acted within his rights in disregarding the jury's answers to those questions which were improper, provided that otherwise the jury answered the pertinent questions adequately, so that the jury, and not the Judge, determined all the important questions of fact.

We would not wish to conclude our discussion of the court cases solely with a case by case analysis. In fact, we have serious doubt as to the value of our research. After one has waded through several hundred decisions on unanswered interrogatories, a more important concept begins to crystallize. By definition, there can be no finite standards to measure what shall constitute the reasonable exercise of discretion in this or any other area. The best judicial minds can reasonably disagree in any particular

discretionary exercise. Uniformity of decision should therefore not be anticipated; neither should conflict surprise. But in the great totality of cases, essential justice is achieved precisely because there is the discretion in the trial judge to gauge his decisions to the ever unique complex of factors before him. How long a divided jury should be encouraged to deliberate; when should a halt be called; in what fact patterns to employ a general charge; where to control the jury by interrogatories, and in what number, these and myriad others are the non-measurable variables which constitute the judicial burden. Ground rules there must be. But where no two cases, juries or judges, can ever be the same, would it not be a serious disservice needlessly to fetter the trial judge and limit his flexibility? When, as here, exigencies arise requiring prompt judicial action, who but the trial judge should be trusted to decide on what measures to employ as will prevent frustration, within the framework, spirit and intent of F. R. C. P. 49(b)?

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

STANDARD, WEISBERG, HAROLDS & MALAMENT,
38 Park Row,
New York, N. Y.,

LEE PRESSMAN,
50 Broadway,
New York, N. Y.,
Counsel of Record for Respondent.

LOUIS R. HAROLDS,
Counsel for Respondent.